



Public Service Commission of Wisconsin

Joseph P. Mettner, Acting Chairman

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

June 3, 1998

Mr. Peter Gardon, Esq.
Reinhart, Boerner, Van Deuren, Norris & Rieselbach
22 East Mifflin Street, Suite 600
P.O. Box 2020
Madison, WI 53703-2020

Re: Contractual Dispute About the Terms of an
Interconnection Agreement Between Ameritech
Wisconsin and Time Warner Communications of Milwaukee L.P.

5912-TD-100
6720-TD-101

Appeal of a Staff Determination

Comments Due:

June 11, 1998 – Noon

FAX Due Date:

June 10, 1998 – Noon

Address Comments To:

Lynda L. Dorr
Secretary to the Commission
Public Service Commission
P.O. Box 7854
Madison, WI 53707-7854
Fax No. (608) 266-3957

Dear Mr. Gardon:

Ameritech, on May 14, 1998, appealed the staff determination of May 5, 1998, in this proceeding.

Staff has prepared the attached memorandum to put the matter before the Commission for consideration of the appeal. (Note that the attachments referenced in the memorandum have been forwarded to the Commissioners, but are not included with this letter.)

Comments on the Ameritech appeal may be filed by noon on **Thursday, June 11, 1998**. If filed by fax, comments are due by noon on **Wednesday, June 10, 1998**. Parties should file

Mr. Peter Gardon, Esq.
Reinhart, Boerner, VanDeuren, Norris & Rieselbach
Page 2

an **original** and **15 copies** of their comments addressed as shown in the box above and must refer to the docket numbers. Fax filing cover sheets must state "**Official Filing**," the docket numbers, and the number of pages (limited to 20 pages). File by one mode only.

Sincerely,

A handwritten signature in black ink that reads "Scot Cullen". The signature is fluid and cursive, with the first name "Scot" and last name "Cullen" clearly distinguishable.

Scot Cullen, P.E.,
Administrator
Telecommunications Division

GAE:lep:slg:t:\ss\letter\T-W dispute appeal cover 6-98

Enclosure

cc: Demetrios Metropoulos, Esq.
Michael Paulson, Esq.
Yoran Dori, Esq.
Lynda Dorr
Records Management/Master File

PUBLIC SERVICE COMMISSION OF WISCONSIN

Memorandum

June 3, 1998

FOR COMMISSION AGENDA

TO: The Commission

FROM: Scot Cullen, Administrator *RSC*
Telecommunications Division

Re: Contractual Dispute About the Terms of an 5912-TD-100
Interconnection Agreement Between Ameritech 6720-TD-101
Wisconsin and Time Warner Communications of Milwaukee L.P.

Appeal of a Staff Determination

Suggested Minute: The Commission (affirmed/did not affirm) the staff determination of May 5, 1998, which found 1) that the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction; 2) that this dispute is a case or controversy which is ripe for a decision now, since the agreement mandates that the parties are to be aggregating the actual billing record minutes of use during the term of the agreement; 3) that postponing a Commission decision to await a FCC decision is not in the parties' interest or in the public interest; 4) that calls to an ISP are local traffic under the Time Warner/Ameritech agreement and subject to the reciprocal compensation provisions of that agreement; 5) that Ameritech shall immediately aggregate the actual billing record minutes of use of local traffic which has been terminated by Time Warner, including traffic which terminates to ISPs on Time Warner's network, since the beginning of the two-year term of the agreement between the two parties; 6) that Ameritech shall comply with the calculation procedures established in the pricing schedule of the agreement relating to reciprocal compensation at the appropriate time; and 7) that if Ameritech is the party with the smaller terminated traffic amount after the specified calculation, the imbalance amount exceeds \$80,000 and Ameritech does not pay the entire amount for which it is liable within the time period specified, Ameritech shall be liable for interest on whatever amount is not paid timely, with interest determined pursuant to the provision of Section 35.5 of the agreement.

On December 2, 1997, Time Warner Communications of Milwaukee L.C. (Time Warner) filed a complaint with the Public Service Commission (Commission) in which Time Warner contends that Ameritech Wisconsin (Ameritech) has violated the terms of the interconnection agreement between Time Warner and Ameritech. That agreement was negotiated and agreed to

by the parties on July 12, 1996, and was submitted to the Commission; it was approved by the Commission by order dated August 27, 1996. Time Warner alleged that—contrary to the agreement—Ameritech had taken a position that it will not pay reciprocal compensation to Time Warner for terminating traffic destined for internet service providers (ISPs) because such traffic is not local traffic.

By letter dated December 8, 1997, the Commission staff established a briefing schedule regarding this dispute. Ameritech's response was filed as ordered, on December 19, 1997. Time Warner filed a reply by the date for a reply as extended, on January 7, 1998.

Commission staff (Gary Evenson and Mary Stevens) issued a staff determination to the parties on May 5, 1998. That determination found that the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction; that the dispute is a case or controversy which is ripe for a decision now, since the agreement mandates that the parties are to be aggregating the actual billing record minutes of use during the term of the agreement; that postponing a Commission decision to await a FCC decision would not be in the parties' interest or in the public interest; that calls to an ISP are local traffic under the Time Warner/Ameritech agreement and are subject to the reciprocal compensation provisions of that agreement; that Ameritech shall immediately aggregate the actual billing record minutes of use of local traffic which has been terminated by Time Warner, including traffic which terminates to ISPs on Time Warner's network, since the beginning of the two-year term of the agreement between the parties; that Ameritech shall comply with the calculation procedures established in the pricing schedule of the agreement relating to reciprocal compensation at the appropriate time; and that if Ameritech is the party with the smaller terminated traffic amount after the specified calculation, the imbalance amount exceeds \$80,000

and Ameritech does not pay the entire amount for which it is liable within the time period specified, Ameritech shall be liable for interest on whatever amount is not paid timely. Staff found that it would be reasonable that interest be determined pursuant to the provision of Section 35.5 of the agreement.

Ameritech filed an appeal to the staff determination on May 14, 1998.

This memorandum (without the attachments) was sent to the parties, and comments related to the appeal invited. Those comments have been provided to the Commission.

Attached to this memorandum are the following items, for the Commission:

- Time Warner complaint of December 2, 1997, with all attachments, including the interconnection agreement between Ameritech and Time Warner
- Ameritech response of December 19, 1997, with all attachments
- Time Warner reply of January 7, 1998, with Exhibit A only (transcript of a telephone message from Ameritech to Counsel for Time Warner)
- Staff determination of May 5, 1998

The filings include other attachments related to correspondence and actions in other states; these are not forwarded with this memo. These materials are available for the Commission on request. Also available, if the Commission wants to review them, are materials from other commissions that were forwarded by the parties after the submittal of the items noted above.

RSC:GAE:lep:slg:t:\ss\cmemo\time warner - ameritech memo re appeal

Attachments (Commissioners' Office only)



Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

May 5, 1998

Via Facsimile

Mr. Peter Gardon
Reinhart, Boerner, Van Deuren,
Norris & Rieselbach, S.C.
P.O. Box 2020
Madison, WI 53701-2020

Mr. Mike Paulson
Ameritech Wisconsin
722 North Broadway, Room 1608
Milwaukee, WI 53202-4396

Re: Contractual Dispute About the Terms of an
Interconnection Agreement Between Ameritech
Wisconsin and Time Warner Communications of Milwaukee L.P.

5912-TD-100
6720-TD-101

Dear Mr. Gardon and Mr. Paulson:

On December 2, 1997, Time Warner Communications of Milwaukee L.C. (Time Warner) filed a complaint with the Public Service Commission (Commission) in which Time Warner contends that Ameritech Wisconsin (Ameritech) has violated the terms of the interconnection agreement between Time Warner and Ameritech. That agreement was approved by the Commission by order dated August 27, 1996. Time Warner alleges that—contrary to their agreement—Ameritech has stated that it will not pay reciprocal compensation to Time Warner for terminating traffic destined for internet service providers (ISPs) because such traffic is not local traffic.

By letter dated December 8, 1997, the Commission staff established a briefing schedule regarding this dispute. Ameritech's response was filed as ordered, on December 19, 1997. Time Warner filed a reply by the date for a reply as extended, on January 7, 1998.

Commission Authority

The Commission has authority to interpret and enforce the provisions of an interconnection agreement under the federal Telecommunications Act of 1996, Wisconsin statutes and Commission's *Interim Procedures for Negotiations, Mediation, Arbitration and Approval of Agreements* (Interim Procedures), and by the terms of the agreement itself. Section 252(e)(1) of the Telecommunications Act requires that all interconnection agreements be submitted for state commission approval. The United States Court of Appeals for the Eighth Circuit has stated, "We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." *Iowa Utilities Board et al. v. FCC and U.S.*, 120 F.3d 753, 804 (8th Cir. 1997).

Under Wisconsin law, parties are required to interconnect by §§ 196.04 and 196.219(3)(a), Stats. The Commission is authorized to investigate complaints by §§ 196.26, 196.28 and 196.30, Stats. The Interim Procedures say that "disputes over interpretation and application of existing agreements may be submitted to the Commission for arbitration under these procedures." In this case, staff is attempting to resolve this controversy more informally with a staff determination, which was the process used in the prior such dispute.

Finally, Time Warner argues that the Commission has authority under the agreement itself to resolve this dispute. Time Warner cites Article XXXIV of the agreement regarding dispute resolution in general and Section 35.5 of the agreement which addresses disputed amounts. Ameritech argues that Section 35.5 of the agreement is the governing section. While both sections cited by the parties include a procedure for alternative dispute resolution, i.e., meetings of designated representatives within short time periods before either party files a complaint with the Commission, Ameritech's reliance solely upon Section 35.5 appears to be related to its arguments that Time Warner has not exhausted its remedies under the agreement and that this dispute is not ripe for decision. Ameritech concedes that the provisions of Section 35.5 "could not have been invoked, because no amounts have been billed. . . ." Ameritech Response, p. 20.

Staff concludes that the Commission does have authority under the agreement itself. The issue is a difference in interpretation of what is billable under Section 5.11, which is entitled "Reciprocal Compensation Arrangements - Section 251(b)(5)." The disagreement regarding the meaning of sections relating to reciprocal compensation and local traffic is a "dispute arising under this Agreement" in Article XXXIV terms, not "a bona fide dispute" about an amount billed on an invoice under Section 35.5.

Regardless of which provision applies, Ameritech further argues that Time Warner has not exhausted its remedies under the agreement. In its Response (p. 6), Ameritech states that it became "suspicious" several months before of "improperly" submitted bills. In fact, Ameritech had already notified another company, TCG Milwaukee, Inc., about this issue on July 3, 1997, months after the same issue had been raised in another jurisdiction. In its letter to Time Warner dated November 5, 1997 (Exhibit 3, Time Warner Complaint), Ameritech indicates that reciprocal compensation does not apply to traffic destined for ISPs and that it is willing "to discuss resolution of this matter" under the Section 35.5 provisions. Designated representatives of the two parties did subsequently discuss the issue to no avail. Time Warner Complaint, para. 10.

On November 26, 1997 (Exhibit A, Time Warner Reply), Michael J. Karson, Vice President and General Counsel of Ameritech Information Industry Services, confirmed that Ameritech was unwavering in its position that ISP traffic is not local traffic. Ameritech admits in its Response (p. 7), filed on December 19, 1997, that the "parties have agreed that their interpretation of the Agreement is unlikely to change at least until the FCC renders its decision on the nature of this traffic." Obviously, the parties are not going to agree about Ameritech's interpretation of

reciprocal compensation, no matter how much they negotiate. Ameritech's insistence that Time Warner exhaust alternative dispute resolution under the agreement only serves to delay an outcome.

Case or Controversy

Ameritech argues that the parties have a "mere difference of opinion," one which is insufficient to give the Commission jurisdiction. Ameritech says that difference of opinion has no potential to ripen into an actual case or controversy until at least August of 1998, when the first true-up for purposes of reciprocal compensation may occur under the agreement.

As Time Warner notes, Ameritech cites cases which were decided under the Uniform Declaratory Judgments Act. Time Warner cites a more recent decision, *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 182 (1982), in which the Wisconsin Supreme Court has re-stated the test for determining whether a "justiciable controversy" exists under that act. Like plaintiff-respondent-petitioner Loy in that case, Ameritech only disputes ripeness, one prong of the four-prong test of justiciability. Time Warner relies upon the reasoning in *Loy* and another case to argue that the issue is ripe for a determination by the Commission.

Time Warner's complaint does not state an action under the Uniform Declaratory Judgments Act nor under its counterpart for agencies (§ 227.41, Stats.). This matter is more properly described as an interpretation of a term of the agreement for enforcement purposes than as a declaration about the rights of the parties. However, staff agrees with Time Warner that this dispute is ripe. First, the requested opinion is not advisory under *Loy*. Time Warner has a sufficient business planning need (Time Warner Complaint, para. 8, and Time Warner Reply, pp. 12-13) to require a decision interpreting the agreement now. A decision would provide specific relief, a definitive answer to a dispute about a term of the agreement which has the potential to financially impact the parties in August 1998. And a decision would be conclusive on the one issue raised in this matter. Second, the facts are not contingent. The "ripening seeds" of a controversy exists between these parties, both of whom are under the Commission's jurisdiction, and the decision would be "a practical help in ending the controversy." *Loy*, 107 Wis. 2d at 412, quoting BORCHARD, DECLARATORY JUDGMENTS (2d ed.) at p.57 (1941).

Parties have a right to know the terms and conditions of an interconnection agreement, which is like a contract in some ways. Presumably, business planning is necessary for both parties during the term of an agreement. Even with true-up, companies have to calculate usage, and possibly accrue payments, on a continuing basis. In fact, the Pricing Schedule attached to the agreement mandates that the parties "aggregate the actual billing record minutes of use" during each Calculation Period, which under this agreement is also the term of the agreement. Ameritech states that it "has to date identified no traffic in Wisconsin that terminates to ISPs on Time Warner's network." Ameritech Response, p. 7. On the other hand, Time Warner alleges that

"more calls from Ameritech customers to Time Warner Communications customers are ISP calls than the reverse. . . ." (Time Warner Complaint, p. 5 n.4) and that it serves nine ISPs (Time Warner Reply, p. 12). Without a determination now, this controversy will brew until true-up time in August 1998. The court in *Loy* describes "ripening seeds" as "a dispute . . . at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead." *Loy*, 107 Wis. 2d at 412, quoting BORCHARD at p. 57. Staff believes that this issue is best resolved now, when the parties still have a few months for planning before August 1998.

Federal Communications Commission (FCC) Proceeding

Ameritech cites a pending FCC proceeding, initiated by the Association for Local Telecommunications Services (ALTS) on June 20, 1997, which requests clarification of the FCC's interconnection order. *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CPD 97-30 (*ALTS Request*). The FCC sought comments regarding this request in July 1997, but has not yet issued any decision. Ameritech argues that the Commission should refrain from taking any action on Time Warner's complaint until the FCC has decided this matter for a number of reasons, including the exclusive jurisdiction of the FCC, its primary jurisdiction and the doctrine of comity, and the possibility of wasted resources.

Historically, the FCC first distinguished enhanced services, including internet service, from basic services in the FCC's Computer II proceedings. In a 1983 access charge order, the FCC decided that enhanced service providers should not be required to pay interstate access charges, even though they may use the facilities of local exchange carriers to originate and terminate interstate calls. *ALTS Request* at 2-3. In 1997, the FCC decided to maintain that exemption. First Report and Order, *In the Matter of Access Charge Reform*, CC Docket 96-262, FCC 97-158, paras. 344-348 (rel. May 16, 1997). That decision means that enhanced service providers, including ISPs, may purchase services from incumbent local exchange carriers under the same intrastate tariffs available to end users. Such providers pay business line rates and the appropriate subscriber line charge rather than interstate access rates.

Ameritech's argument is that—in exempting these calls from the access charge—the FCC has consistently recognized calls to ISPs as exchange access traffic or interstate. Of course, an exemption like this one is really not a jurisdictional statement about the nature of such calls. Arguably, the FCC exemption can also be interpreted to mean that this traffic is local. Over the years, the FCC has considered such traffic to be local for many purposes, not just for end user tariffs. *ALTS Request* at 2, citing *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988). In fact, the FCC repeated the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls, regardless of the ISP's

subsequent handling of the call, and requested comments specifically about whether this policy should be reconsidered. Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC 96-488 (rel. December 24, 1996), paras. 282-290.

Recent decisions of the FCC also can be read to support the local nature of these calls. The FCC has concluded that transport and termination of local traffic for purposes of reciprocal compensation are legally distinct from access charges for interstate long-distance. First Report and Order, *In the Matter of Implementation of Local Competition*, CC Docket No. 96-98 (rel. August 8, 1996), para. 1033. And the FCC has recently distinguished between the service used to connect to an ISP and the ISP's services. Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997), paras. 83 and 789.

At any rate, staff does not believe that postponing a Commission decision serves either party's interest or the public interest. Although the FCC may someday reach a different conclusion than the Commission, we have no reason to presume in advance that such will be the case. The parties can always bring any FCC decision to the attention of the Commission, so it can consider whether further action is appropriate. Furthermore, the issue in this docket is the interpretation of the interconnection agreement between these parties, a matter which is clearly within the Commission's jurisdiction. Resolution of disputes arising under interconnection agreements and the enforcement of these agreements is sound public policy. An issue of this magnitude should be addressed in negotiations or re-negotiations of an interconnection agreement, not by one party's imposing a unilateral solution on the other party under an agreement which is final.

Compensation for Traffic Bound to Internet Service Providers

The relevant sections of the agreement are as follows:

5.11.1 Ameritech's and TWC's compensation for transport and termination on their respective networks of all Local Traffic exchanged between TWC and Ameritech shall be determined as set forth in the Pricing Schedule.

~~5.11.2~~ The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Exchange Access. All Exchange Access and all IntraLATA Toll traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

1.46 "Local Traffic" means local service area calls as defined by the Commission.

1.27 "Exchange Access" is As Defined in the Act.

The Pricing Schedule establishes the rates for minutes of use and directs the parties to "aggregate the actual billing record minutes of use of Local Traffic (excluding Transit Traffic) that has been terminated by the other Party during such Calculation Period. . . ." A "calculation period" is defined as each twenty-four month period after Time Warner's election pursuant to Section 29.2 of the agreement, which also begins the two-year term of the agreement. Within thirty days after the end of a calculation period, each party is to calculate the total dollar amount of local traffic it terminated for the other during the calculation period. The parties then calculate an "imbalance amount" which is equal to the terminated traffic amount of the party with the greater terminated traffic amount minus the other party's terminated traffic amount. Only if the imbalance amount exceeds \$80,000 would the party with the smaller amount of such traffic pay to the other within thirty days the entire imbalance amount (including the initial \$80,000). Ameritech concedes that the first such payment could be August 1998. Ameritech Response, p.1.

"Exchange access" as defined in the federal law "means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

The agreement was approved by the Commission at its open meeting on August 27, 1996. The Commission's letter order of approval was issued on August 27, 1996. The agreement was in effect when Time Warner sent its inquiry about reciprocal compensation on October 30, 1997 (Exhibit 2, Time Warner Complaint), and Ameritech Information Industry Services replied on November 5, 1997 (Exhibit 3, Time Warner Complaint), that it considers Ameritech's end user traffic destined for ISPs to be exchange access traffic and so not subject to the reciprocal compensation provisions of the agreement.

Time Warner argues that a call to an ISP terminates within the local calling area at the ISP's premises associated with a local number. Ameritech argues that a call to an ISP terminates on the internet and is therefore not a local call, even though Ameritech charges its own ISP customers local business line rates for local telephone exchange service and treats these revenues for its own service to ISPs as local traffic for purposes of separations and ARMIS reporting. The FCC has said that the provision of internet service via the traditional telecommunications network consists of multiple components. Report and Order, *Access Charge Reform*, paras. 344-348. We agree. The telecommunications service component, rather than the information service component, should be the basis for determining the jurisdiction of the traffic involved in calls to ISPs. Termination occurs when a call has been received by the telephone exchange service to which it was addressed, a call record has been generated and answer supervision has been returned.

In the agreement, reciprocal compensation applies to transport and termination of local traffic. "Local traffic" means local service area calls as defined by this Commission. So this Commission's policies decide this issue rather than the policies of the FCC. As stated above,

FCC policies arguably favor a determination that these calls are local anyway. However the FCC decides in the future, this Commission previously determined that customers located in the same exchange, or in exchanges which have Extended Community Calling, are customers making local calls for which local interconnection rates apply.¹ Findings of Fact, Conclusions of Law and First Final Order, *Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, docket 05-TI-138 (July 2, 1996). Staff believes that the majority of calls to ISPs are both originated and terminated within a local calling area, in that one company is handing off or terminating such calls to the other company.

Ameritech contends that calls to ISPs are exchange access traffic within the terms of the agreement and thus exempt from the reciprocal compensation provisions under Section 5.11.1; however, this appears to be argument, not fact. The majority of these calls do not meet the definition of "exchange access" in the federal act. In addition, Ameritech did not build into the agreement an accounting mechanism to separately identify ISP traffic. Nor is there a percentage internet usage factor, as is used elsewhere in the agreement when it is necessary to differentiate and identify differently rated traffic types. In documents in another docket, Ameritech admits that it cannot determine actual amounts for the termination of calls to ISPs but will be using estimates. Finally, Ameritech's proposal would create a class of traffic, based on type of customer, for which no compensation under this agreement is due.

For all of the reasons above, we conclude that (1) the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction, (2) this dispute is a case or controversy which is ripe for a decision now, since the agreement mandates that the parties are to be aggregating the actual billing record minutes of use during the term of the agreement, (3) postponing a Commission decision to await a FCC decision is not in the parties' interest or in the public interest, and (4) calls to an ISP are local traffic under the Time Warner/Ameritech agreement and subject to the reciprocal compensation provisions of that agreement. Therefore, Ameritech shall immediately aggregate the actual billing record minutes of use of local traffic which has been terminated by Time Warner, including traffic which terminates to ISPs on Time Warner's network, since the beginning of the two-year term of the agreement between the two parties. Ameritech shall comply with the calculation procedures established in the Pricing Schedule relating to reciprocal compensation at the appropriate time. If Ameritech is the party with the smaller terminated traffic amount after the specified calculation, the imbalance amount exceeds \$80,000 and Ameritech does not pay the entire amount for which


¹ Read in the context of the 05-TI-138 order, it is apparent that the Commission also includes exchanges that have extended area service (EAS).

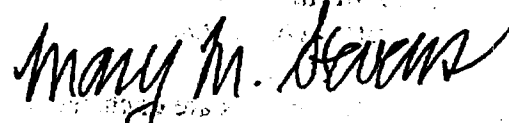
Mr. Gardon and Mr. Paulson
Docket 5912-TD-100/6720-TD-101
Page 8

it is liable within the time period specified, Ameritech shall also be liable for interest on whatever amount is not paid timely.²

This is an informal staff determination. Ameritech has the right to appeal this determination to the Commission. Appeals to the Commission must be filed in writing within seven business days. If you have any further questions regarding this matter, please call Gary Evenson at (608) 266-6744 or Mary Stevens at (608) 266-1125.

Sincerely,


Gary A. Evenson
Assistant Administrator
Telecommunications Division


Mary M. Stevens
Legal Counsel
Telecommunications Division

MMS:GAE:slj:t:\staff\mms\Time-W & Ameritech dispute under agree(Final)

cc: RM/Master File

² Although staff does not view this dispute as a matter to address under Section 35.5 of the agreement, we note that Section 35.5 does address the issue of interest. We suggest that the percent specified there is appropriate for determining the interest due on these past due amounts.



Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Ms. Rhonda Johnson
Boardman, Suhr, Curry & Field
P.O. Box 927
Madison, WI 53701-0927

Mr. Mike Paulson
Ameritech
722 North Broadway, Room 1608
Milwaukee, WI 53202-4396

Re: Contractual Dispute About the Terms of an Interconnection 5837-TD-100
Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc. 6720-TD-100

Dear Ms. Johnson and Mr. Paulson:

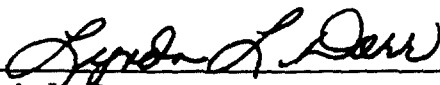
At its open meeting on May 7, 1998, the Commission affirmed the staff determination issued on March 31, 1998, in the above-captioned docket. Ameritech Wisconsin (Ameritech) had appealed that determination on April 7, 1998.

The Commission determined that the issue before the Commission is the interpretation of the interconnection agreement between Ameritech Wisconsin (Ameritech) and TCG Milwaukee, Inc. (TCG), a matter over which the Commission has jurisdiction under 47 U.S.C. § 252(e) and the Commission's *Interim Procedures for Negotiations, Mediation, Arbitration and Approval of Agreements*, under §§ 196.04, 196.219(3)(a), 196.26, 196.28 and 196.30, Stats., and by the terms of the agreement itself. The Commission found that TCG had exhausted alternative dispute resolution procedures under Section 29.18 of the agreement. The Commission also decided that postponing a Commission decision to await a Federal Communications Commission decision is not in the parties' interest or in the public interest. Finally, the Commission found that calls to an internet service provider are local traffic—not switched exchange access service—under the agreement and subject to the reciprocal compensation provisions of that agreement.

The Commission therefore orders that Ameritech resume immediately reciprocal compensation payments in accordance with the agreement, and pay the past due amounts, with interest as specified in Section 29.10.5 of the agreement, within 10 days.

Dated at Madison, Wisconsin, May 13, 1998

By the Commission:


Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights.

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 4/22/91

PUBLIC SERVICE COMMISSION OF WISCONSIN

Memorandum

April 13, 1998

FOR COMMISSION AGENDA

TO: The Commission

FROM: Scot Cullen, Administrator *SC*
Telecommunications Division

RE: Contractual Dispute About the Terms of an
Interconnection Agreement Between Ameritech
Wisconsin and TCG Milwaukee, Inc.

5837-TD-100
6720-TD-100

Appeal of a Staff Determination

Suggested Minute: The Commission (affirmed/did not affirm) the staff determinations that the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction; that postponing a Commission decision to await a Federal Communications Commission decision is not in the parties' interest or in the public interest; that calls to an ISP are local traffic under the TCG/Ameritech interconnection agreement and subject to the reciprocal compensation provisions of that agreement; and that Ameritech should immediately resume reciprocal compensation payments in accordance with the agreement and pay the past due amounts, with interest, to TCG within 10 days. The Telecommunications Division was directed to draft a letter order to the parties to reflect this decision.

On September 17, 1997, TCG Milwaukee, Inc. (TCG), filed a complaint with the Public Service Commission (Commission) in which TCG contends that Ameritech Wisconsin (Ameritech) has violated the terms of the interconnection agreement between TCG and Ameritech. That agreement was approved by the Commission by order dated March 5, 1997. TCG alleges that—contrary to their agreement—Ameritech has stopped paying, and is still refusing to pay, TCG for terminating traffic destined for Internet service providers (ISPs).

By letter dated October 17, 1997, the Commission staff established a schedule for the filing of comments. Ameritech's response was filed on October 30, 1997. TCG filed a reply on November 6, 1997.

Staff (Gary Evenson and Mary Stevens) issued a staff determination to the parties on March 31, 1998. That determination found that (1) the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction, (2) postponing a Commission decision to await a Federal Communications Commission (FCC) decision is not in the parties' interest or in the public interest, and (3) calls to an ISP are local traffic under the TCG/Ameritech interconnection agreement and subject to the reciprocal compensation provisions of that agreement. The staff determination further concluded that

Ameritech should immediately resume reciprocal compensation payments in accordance with the agreement and that Ameritech should pay TCG the past due amounts for this traffic, with interest.

Ameritech filed an appeal to the staff determination on April 7, 1998.

This memorandum (without the attachments) was sent to the parties, and comments related to the appeal invited. Those comments have been provided to the Commission.

Attached to this memorandum are the following items, for the Commissioners:

- TCG complaint of September 17, 1997, including:
 - Exhibit 1 to that complaint: Interconnection agreement between Ameritech and TCG
 - Exhibit 2 to that complaint: July 3, 1997, Ameritech letter to TCG¹
 - Exhibit 3 to that complaint: August 8, 1997, TCG letter to Ameritech
 - Exhibit 4 to that complaint: August 19, 1997, TCG letter to Ameritech
 - Exhibit 5 to that complaint: August 20, 1997, Ameritech letter to TCG
 - Exhibit 6 to that complaint: August 26, 1997, Ameritech letter to TCG
 - Exhibit 7 to that complaint: August 29, 1997, TCG letter to Ameritech
- Ameritech Response of October 30, 1997
- TCG Reply of November 6, 1997
- Staff determination of March 31, 1998

The filings by TCG and Ameritech included other attachments that are not forwarded with this memo. These include filings with the FCC, an affidavit related to the complaint, definitions, and copies of testimony and orders in proceedings in other states. These materials are available for the Commissioners on request. Also available, if the Commissioners want them, are materials from other commissions that were forwarded by the parties after the submittal of the items noted above. The transcript of the arbitration proceeding (5837-MA-100 and 6720-MA-102) that addressed the TCG-Ameritech interconnection agreement is also available in Records Management.

RSC:GAE:slj:t:\ss\cmemo\tcg-ameritech memo re appeal of staff

Attachments

¹ This was described correctly in the staff determination, though misidentified as Exhibit 4.



Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Daniel J. Eastman, Commissioner
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

April 13, 1998

By Facsimile Only

To: Ms. Rhonda Johnson
Boardman, Suhr, Curry & Field
P.O. Box 927
Madison, WI 53701-0927

Mr. Mike Paulson
Ameritech Wisconsin
722 North Broadway, Room 1608
Milwaukee, WI 53202-4396

Re: Contractual Dispute About the Terms of an Interconnection Agreement 5837-TD-100
Between Ameritech Wisconsin and TCG Milwaukee, Inc. 6720-TD-100

Comments from Ameritech Due: April 22, 1998 - Noon	Address Comments To: Lynda L. Dorr Secretary to the Commission Public Service Commission P.O. Box 7854 Madison, WI 53707-7854 Fax No. (608) 266-3957
FAX Due Date: April 21, 1998 - Noon	
Replies to Ameritech Filing Due: April 30, 1998 - Noon	
FAX Due Date: April 29, 1998 - Noon	


Ameritech has appealed the staff determination of March 31, 1998, in this proceeding. Staff has prepared the attached memorandum to put the matter before the Commission for consideration of the appeal. (Note that the attachments referenced in the memorandum have been forwarded to the Commissioners, but are not included with this letter.)

Ameritech may file comments in support of its appeal by noon on **Wednesday, April 22, 1998**. If filed by fax, Ameritech's comments are due by noon on **Tuesday, April 21, 1998**. Replies to the Ameritech comments may be filed by noon on **Thursday, April 30, 1998**. If filed by fax, the replies are due by noon on **Wednesday, April 29, 1998**. Parties should file an **original** and **15 copies** of their comments addressed as shown in the box above and must refer to the docket

Ms. Johnson and Mr. Paulson
Dockets 5837-TD-100 and 6720-TD-100
Page 2

numbers. Fax filing cover sheets must state "**Official Filing**," the docket numbers, and the number of pages (limit of 20 pages for fax filings). File by one mode only.

Sincerely,

A handwritten signature in black ink, appearing to read "Scot Cullen". The signature is fluid and cursive, with the first name "Scot" and last name "Cullen" clearly distinguishable.

Scot Cullen, P.E.,
Administrator
Telecommunications Division

GAE:slj:t:\ss\letter\tcg dispute appeal cover

cc: Peter Gardon, Esq.
Grant Spellmeyer, Esq.
Records Management/Master File



Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Daniel J. Eastman, Commissioner
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

March 31, 1998

Via Facsimile

Ms. Rhonda Johnson
Boardman, Suhr, Curry & Field
P.O. Box 927
Madison, WI 53701-0927

Mr. Mike Paulson
Ameritech Wisconsin
722 North Broadway, Room 1608
Milwaukee, WI 53202-4396

Re: Contractual Dispute About the Terms of an
Interconnection Agreement Between Ameritech
Wisconsin and TCG Milwaukee, Inc.

5837-TD-100
6720-TD-100

Dear Ms. Johnson and Mr. Paulson:

On September 17, 1997, TCG Milwaukee, Inc. (TCG), filed a complaint with the Public Service Commission (Commission) in which TCG contends that Ameritech Wisconsin (Ameritech) has violated the terms of the interconnection agreement between TCG and Ameritech. That agreement was approved by the Commission by order dated March 5, 1997. TCG alleges that—contrary to their agreement—Ameritech has stopped paying, and is still refusing to pay, TCG for terminating traffic destined for internet service providers (ISPs).

By letter dated October 17, 1997, the Commission staff established a briefing schedule. Ameritech's response was filed as ordered, on October 30, 1997. TCG filed a reply by the date ordered, on November 6, 1997.

Commission Authority

The Commission has authority to interpret and enforce the provisions of an interconnection agreement under the federal Telecommunications Act of 1996, Wisconsin statutes and Commission's *Interim Procedures for Negotiations, Mediation, Arbitration and Approval of Agreements* (Interim Procedures), and by the terms of the agreement itself. Section 252(e)(1) of the Telecommunications Act requires that all interconnection agreements be submitted for state commission approval. The United States Court of Appeals for the Eighth Circuit has stated, "We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." *Iowa Utilities Board et al. v. FCC and U.S.*, 120 F.3d 753, 804 (8th Cir. 1997).

Under Wisconsin law, parties are required to interconnect by §§ 196.04 and 196.219(3)(a), Stats. The Commission is authorized to investigate complaints by §§ 196.26, 196.28 and 196.30, Stats. The Interim Procedures say that "disputes over interpretation and application of existing agreements may be submitted to the Commission for arbitration under these procedures." In this case, staff is attempting to resolve this controversy more informally with a staff determination, which was indicated as the intended process in the staff's October 17, 1997, letter.

Finally, TCG argues that the Commission has authority under the agreement itself to resolve this dispute. TCG cites Section 29.18 of the agreement regarding dispute escalation and resolution. Ameritech argues that Section 29.10 of the agreement, which addresses disputed amounts, is the appropriate section. While both sections cited by the parties include a procedure for alternative dispute resolution, i.e., meetings of designated representatives within short periods before either party files a complaint with the Commission, Ameritech's insistence on Section 29.10 appears to be related to its claim that TCG has not exhausted alternative dispute resolution procedures. As Exhibit 4 of its complaint, TCG provides a letter dated August 19, 1997, from Jim Washington, Vice President of TCG, to Gert Anderson, Director of Account Operations, Ameritech Information Industry Services, in which Mr. Washington confirms impasse between the parties under Section 29.18 of the agreement. TCG does not claim to have exhausted the procedures under Section 29.10. same proc.

Staff concludes that the Commission has authority under the agreement itself. The issue in this docket, the meaning of sections relating to reciprocal compensation, invokes the application of Section 29.18 rather than Section 29.10. The question is not the accuracy of TCG's billing but rather a difference in interpretation of what is billable under Section 5.6, which is entitled "Reciprocal Compensation Arrangements – Section 251(b)(5)."

Furthermore, staff agrees with TCG's conclusion in Exhibit 7 of its complaint that the parties did indeed exhaust the procedures under the agreement. In its response, Ameritech states that it became "suspicious" several months before of "improperly" submitted bills. In fact, Ameritech notified TCG about this issue on July 3, 1997, months after the same issue had been raised in another jurisdiction. In its letter dated July 3, 1997 (Exhibit 4, TCG Complaint), Ameritech indicates its willingness to negotiate but only to determine the "specific amounts that have been paid in error." With no prior negotiation, Ameritech began unilaterally withholding payments to TCG for terminating traffic destined for ISPs.

Obviously, the parties are not going to agree about Ameritech's interpretation of reciprocal compensation, no matter how much they negotiate. Ameritech's insistence that TCG exhaust alternative dispute resolution under Section 29.10 only serves to delay an outcome.

Federal Communications Commission (FCC) Proceeding

Ameritech cites a pending FCC proceeding, initiated by the Association for Local Telecommunications Services (ALTS) on June 20, 1997, which requests clarification of the FCC's interconnection order. *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CPD 97-30 (*ALTS Request*). The FCC sought comments regarding this request in July 1997, but has not yet issued any decision. Ameritech argues that the Commission should refrain from taking any action on TCG's complaint until the FCC has decided this matter for a number of reasons, including the risk of inconsistent results, the wasting of resources, and the possibility of gaining guidance from the FCC.

Historically, the FCC first distinguished enhanced services, including internet service, from basic services in the FCC's Computer II proceedings. In a 1983 access charge order, the FCC decided that enhanced service providers should not be required to pay interstate access charges, even though they may use the facilities of local exchange carriers to originate and terminate interstate calls. *ALTS Request* at 2-3. In 1997, the FCC decided to maintain that exemption. First Report and Order, *In the Matter of Access Charge Reform*, CC Docket 96-262, FCC 97-158, paras. 344-348 (rel. May 16, 1997). That decision means that enhanced service providers, including ISPs, may purchase services from incumbent local exchange carriers under the same intrastate tariffs available to end users. Such providers pay business line rates and the appropriate subscriber line charge rather than interstate access rates.

Ameritech's argument is that—in exempting these calls from the access charge—the FCC has consistently recognized calls to ISPs as exchange access traffic or interstate. Of course, an exemption like this one is really not a jurisdictional statement about the nature of such calls. Arguably, the FCC exemption can also be interpreted to mean that this traffic is local. Over the years, the FCC has considered such traffic to be local for many purposes, not just for end user tariffs. *ALTS Request* at 2, citing *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988). In fact, the FCC repeated the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls, regardless of the ISP's subsequent handling of the call, and requested comments specifically about whether this policy should be reconsidered. Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC 96-488 (rel. December 24, 1996), paras. 282-290.

Recent decisions of the FCC also can be read to support the local nature of these calls. The FCC has concluded that transport and termination of local traffic for purposes of reciprocal compensation are legally distinct from access charges for interstate long-distance. First Report and Order, *In the Matter of Implementation of Local Competition*, CC Docket No. 96-98 (rel. August 8, 1996), para. 1033. And the FCC has recently distinguished between the service used

to connect to an ISP and the ISP's services. Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-147 (rel. May 8, 1997), paras. 83 and 789.

At any rate, staff does not believe that postponing a Commission decision serves either party's interest or the public interest. Although the FCC may someday reach a different conclusion than the Commission, we have no reason to presume in advance that such will be the case. The parties can always bring any FCC decision to the attention of the Commission, so it can consider whether further action is appropriate. Furthermore, the issue in this docket is the interpretation of the interconnection agreement between these parties, a matter which is clearly within the Commission's jurisdiction. Resolution of disputes arising under interconnection agreements and the enforcement of these agreements is sound public policy. An issue of this magnitude should be addressed in negotiations or re-negotiations of an interconnection agreement, not by one party's imposing a unilateral solution on the other party under an agreement which is final.

Compensation for Traffic Bound to Internet Service Providers

The relevant sections of the agreement are as follows:

5.6.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or TCG which a Telephone Exchange Service Customer originates on Ameritech's or TCG's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided in the Pricing Schedule.

5.6.2 The Reciprocal Compensation arrangements set forth in the Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

1.43 "Local Traffic" means local service area calls as defined by the Commission.

1.65 "Switched Exchange Access Service" means the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

The agreement was approved by the Commission at its open meeting on March 4, 1997. The Commission's letter order of approval was issued on March 5, 1997. The agreement was in effect when Ameritech Information Industry Services, by letter dated July 3, 1997 (Exhibit 4, TCG Complaint), informed TCG that it considers Ameritech's end user traffic destined for ISPs to be exchange access traffic and so not subject to the reciprocal compensation provisions of the agreement. Although the companies had until this time billed and paid each other for reciprocal compensation regardless of the type of end user, Ameritech began paying TCG only the undisputed portions of TCG's bills and excluded reciprocal compensation for charges billed by TCG for traffic destined to ISPs in Wisconsin.

TCG argues that a call to an ISP terminates within the local calling area at the ISP's premises associated with a local number. Ameritech argues that a call to an ISP terminates on the internet and is therefore not a local call, even though Ameritech charges its own ISP customers local business line rates for local telephone exchange service and treats these revenues for its own service to ISPs as local traffic for purposes of separations and ARMIS reporting. The FCC has said that the provision of internet service via the traditional telecommunications network consists of multiple components. Report and Order, *Federal-State Joint Board on Universal Service*, paras. 344-348. We agree. The telecommunications service component, rather than the information service component, should be the basis for determining the jurisdiction of the traffic involved in calls to ISPs. Termination occurs when a call has been received by the telephone exchange service to which it was addressed, a call record has been generated and answer supervision has been returned. See TCG Reply, Exhibits G and H.

In the agreement, reciprocal compensation applies to transport and termination of local traffic. "Local traffic" means local service area calls as defined by this Commission. So this Commission's policies decide this issue rather than the policies of the FCC. As stated above, FCC policies arguable favor a determination that these calls are local anyway. However the FCC decides in the future, this Commission previously determined that customers located in the same exchange, or in exchanges which have Extended Community Calling, are customers making local calls for which local interconnection rates apply.¹ Findings of Fact, Conclusions of Law and First Final Order, *Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*. Docket 05-TI-138 (July 2, 1996). Staff believes that the majority of calls to ISPs are both originated and terminated within a local calling area, in that one company is handing off or terminating such calls to the other company.

Ameritech contends that calls to ISPs are switched exchange access service within the terms of the agreement and thus exempt from the reciprocal compensation provisions under Section 5.6.2; however, this appears to be argument, not fact. These calls are not among the listed services in

¹ Read in the context of the 05-TI-138 order, it is apparent that the Commission also includes exchanges that have extended area service (EAS).

the agreement's Section 1.65 definition of "switched exchange access service" that are exempt from reciprocal compensation. In addition, Ameritech did not build into the agreement an accounting mechanism to separately identify ISP traffic. Nor is there a percentage internet usage factor, as is used elsewhere in the agreement when it is necessary to differentiate and identify differently rated traffic types. In its July 3, 1997, letter which triggered this dispute, Ameritech admits that it cannot determine actual amounts for the termination of calls to ISPs but will be using estimates. Finally, Ameritech's proposal would create a class of traffic, based on type of customer, for which no compensation under this agreement is due.

In this arbitration, one of the three issues in dispute was how to price terminating calls. TCG argued for bill and keep, rather than reciprocal compensation. At the hearing in this matter, Ameritech extensively cross-examined a TCG witness, W. P. Montgomery, to show that a competitive local exchange company could market to customers with disproportionately high out-going volume. Transcript at 64. The panel specifically rejected TCG's bill-and-keep proposal and adopted the pricing mechanism which Ameritech favored, reciprocal compensation. In the aftermath of that decision, TCG has seemingly successfully marketed not to customers with high out-going volumes, as Ameritech had speculated, but to customers with high in-coming volumes. While that is unfortunate for Ameritech, Ameritech won its argument on how to price the termination of calls and, like all of us, has to live with the consequences of its own actions. Ameritech cannot now unilaterally apply bill and keep to ISP traffic by reclassifying it.

Furthermore, Ameritech was aware before the hearing in this arbitration of a disparity in the amount of minutes of use that TCG and Ameritech terminated on the other's local network. Based on a traffic study in Wisconsin for June, July and August of 1996, Ameritech witness Suzanne Springsteen testified that the disparity was approximately 1,200 percent and that Ameritech was terminating more traffic on TCG's network than vice versa. Transcript at 348 and 357. She clearly indicated that her testimony was offered in support of reciprocal compensation, in opposition to bill and keep. Transcript at 358. Ameritech was at that time apparently willing to pay disproportionately under a reciprocal compensation arrangement. Ameritech is now bound by the terms and conditions of its agreement with TCG.

For all of the reasons above, we conclude that (1) the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction, (2) postponing a Commission decision to await a FCC decision is not in the parties' interest or in the public interest, and (3) calls to an ISP are local traffic under the TCG/Ameritech agreement and subject to the reciprocal compensation provisions of that agreement. Therefore, Ameritech shall immediately resume reciprocal compensation payments in accordance with the agreement and shall, within 10 days, pay the past due amounts, with interest²

² Although staff does not view this dispute as a matter to address under Section 29.10 of the agreement, we note that Section 29.10.5 does address the issue of interest. We suggest that the percent specified there is appropriate for determining the interest due on these past due amounts.